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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935

No. 360

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR RESPONDENT.

ABRAHAM R. MILLER,
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ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR RESPONDENT.

Preliminary Statement.

The opinion of the Appellate Court for the First District of Illinois, which is here being reviewed, has not been printed.

The statement of facts contained in the petitioner's brief and in the opinion of the Appellate Court, from which petitioner has quoted, is substantially accurate, and respondent, therefore, does not deem it necessary to make any further statement of fact.

ARGUMENT.

I.

The order of the Interstate Commerce Commission in Docket 11703 merely prescribed a general level of intrastate rates and therefore did not deprive the State authorities of their inherent jurisdiction to deal with specific intrastate rates provided that such general level was not thereby violated.

The first question presented by this case is whether the Illinois Commerce Commission was deprived of all jurisdiction to grant reparation based on the unreasonableness and discrimination of a specific intrastate rate, by reason of the fact that the Interstate Commerce Commission, acting under the power conferred upon it by Section 15 (a) of the Interstate Commerce Act, had previously granted the carriers as a whole a general increase in revenue, and thereafter, acting under Section 13 (4) of the same Act, had required the carriers in Illinois to increase the general level of Illinois intrastate rates to conform with the increase on interstate traffic previously ordered.

Prior to the enactment of the Transportation Act of 1920, (41 Stat. at L. 456, Chap. 91), the Interstate Commerce Commission had no jurisdiction over state rates except where such state rates created a prejudice against persons and localities engaged in interstate commerce. (Minnesota Rate Case—*Simpson* v. *Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729.)

The Transportation Act of 1920 by Sec. 422 (Sec. 15a, Interstate Commerce Act), required the Interstate Commerce Commission to establish rates which would permit the carriers as a whole to earn a fair return upon the aggregate value of their property. By Section 416 of that Act (Sec. 13 (4) Interstate Commerce Act) the power of the Interstate Commerce Commission was extended to permit the removal of unjust discrimination by intrastate rates, not only as to persons and localities, but also as to interstate commerce as a whole.

The right of the Interstate Commerce Commission to establish purely intrastate rates under Section 13 (4) must be read in connection with the duty of Congress under Section 15 (a) to prescribe adequate revenues for the railroads.

> *Florida* v. *United States,* 282 U. S. 194, 211; 75 L. Ed. 291, 302; 51 S. Ct. 119.
>
> *United States* v. *Louisiana,* 290 U. S. 70, 75; 78 L. Ed. 181, 185; 54 S. Ct. 28.

The general authority either to prescribe reasonable state rates or to remove discrimination between state rates themselves is at all times lodged with the state authorities. See *Florida* v. *United States,* 282 U. S. 194, 212, 214; 75 L. Ed. 291, 302, 303; 51 S. Ct. 119, where this court said:

> "The Commission has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates. *Arkansas R. Commission* v. *Chicago, R. I. & P. R. Co.,* 274 U. S. 597, 71 L. ed. 1224, 47 S. Ct. 724. * * *

"The authority to determine the reasonableness *per se* of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission."

The Interstate Commission has no power (in the absence of any discrimination as to persons and localities) to prescribe minimum intrastate rates unless it first finds that such rates are necessary in order to avoid an undue burden from a revenue standpoint on interstate commerce.

Florida v. *United States,* 282 U. S. 194, 212; 75 L. Ed. 291, 302; 51 S. Ct. 119.

Where the Interstate Commerce Commission has entered an order under Section 13 (4), requiring the general level of state rates to be increased, the state commission is not thereby deprived of its power over specific state rates so long as it does not violate the general level which the Interstate Commerce Commission has prescribed. This Court said in *Railroad Commission of Wisconsin* v. *Chicago, Burlington, & Quincy R. R. Co.,* 257 U. S. 563, 590; 66 L. Ed. 371, 384; 42 S. Ct. 232:

"It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and *must leave appropriate discretion to the state authorities to deal with intrastate rates*

as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." (Italics supplied.)

Of course the Interstate Commission, by virtue of the power conferred upon it by Sections 13 (4) and 15 (a) does not acquire any power to raise intrastate rates above a reasonable level. The Commission is not concerned with the reasonableness *per se* of these rates, but is limited thereby in the extent to which it may raise intrastate rates under that section. It cannot increase specific intrastate rates, even where they are not compensatory, in the absence of discrimination by such state rates against interstate commerce as a whole. In other words, the Interstate Commerce Commission has no power to raise a confiscatory intrastate rate unless it also finds that that rate casts a burden upon interstate commerce from the standpoint of revenue.

Florida v. *United States*, 282 U. S. 194, 212; 75 L. Ed. 291, 302; 51 S. Ct. 119.

Therefore the Illinois Commerce Commission, in our case, after the entry of the order in Docket 11703, did not lose its power to prescribe reasonable intrastate rates or to remove discrimination between purely state rates so long as it did not interfere with the "general level which the Interstate Commerce Commission had found to be fair." The Illinois Commission could therefore have prescribed rates for the future on shipments of common brick from Bernice, Illinois, for purely intrastate movement at any level which the Illinois Commission found reasonable. The sole limitation upon that power was that such rates should not reduce the general level of Illinois state rates which the Interstate Commerce Commission had found to be fair.

If any carrier felt that such reduction in the specific state rate would result in so reducing the general level of state rates, it could immediately resort to court proceedings to enjoin the enforcement of such lower rate. (*Railroad Commission of Wisconsin* v. *C. B. & Q. R. R. Co., supra.*)

Petitioner cites *Georgia Public Service Commission* v. *United States,* 283 U. S. 765, 772; 75 L. Ed. 1397, 1404; 51 S. Ct. 619, as authority for the proposition that it is necessary in such case to apply first to the Interstate Commerce Commission, requesting it to suspend the operation of the intrastate rate order. This case is no authority whatever for such proposition. It merely holds that where the order of the Interstate Commission is so vague that it is impossible to determine the manner in which it shall be applied to a specific rate, then application should be made to the Interstate Commission to clarify that order.

While it is not clear from the decision in the *Wisconsin Passenger Rate* Case whether the attempted interference by the Wisconsin Commission was directed against all the state passenger rates or only a portion thereof, no distinction in principle is involved. In either case the only question is whether the action of the state commission (whether it attempts to interfere with all the state rates, 50 per cent thereof, or only one rate) results in a reduction of the general level of the state rates "previously found to be fair" by the Interstate Commission. That question can be determined by the proper court.

To hold otherwise would result, in a situation like ours, in depriving the state authorities of all power over purely intrastate rates, even as to a particular rate which in fact did not prejudice interstate commerce. The mere possibility of such interference with interstate commerce would

under such a doctrine be sufficient to deprive the state authorities of all power over intrastate traffic.

Petitioner, in order to avoid being forced into such an indefensible position, virtually concedes that the state commission has the power to reduce prospectively a specific state rate, but contends that a different rule should be applied where the state commission seeks to grant reparation.

In reply to such contention, it must be first observed that the Interstate Commerce Commission would have no power to grant reparation in a situation of this kind because Section 13 (4) gives it power only to prescribe rates for the future.

Atlantic Coast Line R. R. Co. v. *Florida,* 295 U. S. 301, 311; 79 L. Ed. 1451, 1458; 55 S. Ct. 713.

In other words, if, after the order of the Interstate Commerce Commission in Docket 11703, a proceeding had been instituted before the Interstate Commerce Commission, attacking the reasonableness of the brick rate from Bernice and seeking reparation, the Interstate Commerce Commission might have found such rate unreasonable and ordered its reduction for the future, but could not have granted reparation.

To adopt the contention of petitioner that the state commission also has no power to grant reparation in such case, would mean that the shipper would be without remedy although he has been compelled to pay a rate which has not been specifically found reasonable before its exaction, which he had no opportunity to prove unreasonable before its exaction, and which is ultimately found unreasonable.

Secondly, as we have already argued, the state commission has power to reduce prospectively a specific state

rate which it finds unreasonable, provided only that such reduction does not result in a reduction in the general level of the state rates previously found by the Interstate Commission to be fair. It seems clear that the power to prescribe rates for the future must also include the power to grant reparation or damages for the past exaction of unreasonable rates unless it is limited by the statute which has created the commission. There is no such limitation in the Illinois Public Utilities Act. That Act very clearly gives the Illinois Commission such power. (Ill. State Bar Stats. 1935, Ch. 111a, Sec. 72, ¶91.)

While Section 13 (4) of the Interstate Commerce Act limits the right of the Interstate Commerce Commission to grant reparation in such case, it does not in express terms limit the power of the state authorities in that respect.

It is respectfully submitted, therefore, that no limitation upon the power of the state authorities to grant reparation on purely state traffic can be implied except the limitation implied as to the reduction of rates in the future, namely, that such award of reparation or such prospective reduction in rate shall not result in a reduction of the general level of state rates previously authorized by the Interstate Commerce Commission.

Thirdly, a reparation award may be enforced only by a suit for a judgment upon such award. In such suit, if the carrier believes that the award of reparation by the State Commission constitutes an interference with the order of the Interstate Commission increasing the general level of state rates, it has full opportunity to present such contention as a defense to the entry of a judgment, exactly as the petitioner has done in this case. Of course, it would be necessary for the respondent to make the proper showing by competent evidence.

It is respectfully submitted that this record is entirely barren of any evidence from which this Court can find that the award of reparation by the Illinois Commission materially violated the general level of the state rates prescribed by the Interstate Commerce Commission in Docket 11703. Indeed, it is apparent that the award of reparation in this case involved only a negligible amount of revenue when compared with the total increase of revenue awarded the carriers operating in the State of Illinois. The findings of the Commission in Docket 11703 (Rec. 160) show that the difference between the 35 per cent increase originally granted by the Illinois Commission and the 40 per cent increase decreed in Docket 11703 amounted to approximately $3,000,000 on intrastate shipments. It is therefore apparent that the total increased revenues granted the carriers as a whole on intrastate traffic in Illinois by the 40 per cent increase in the general level of rates amounted to something like $24,000,000. The amount of increased revenue which the carriers were expected to derive from increased interstate rates in Illinois is not shown, but it must have amounted to many millions of dollars in addition to the $24,000,000 to be derived from the intrastate traffic. The award of reparation in this case, amounting to less than $29,000, could not possibly have violated the general level of the increase in revenues thus granted. Even the petitioner makes no contention that it did.

Petitioner suggests that if the State Commission is permitted to grant reparation in any case, the Interstate Commission will be without power to "protect its order against such attacks." The truth is that the Interstate Commerce Commission never protects its orders. No machinery has been set up by the Interstate Commerce Act or any other act whereby the Commission can protect its orders. Such orders can be enforced only by a court of competent juris-

diction, and interference with such orders can be prevented only by such court.

The petitioner further contends that if the state commission is permitted to grant reparation in any particular case, then the state commission, by granting reparation in a large number of other cases involving particular state movements, could "retroactively restore the discrimination against interstate commerce removed by the Interstate Commerce Commission's order." Therefore petitioner contends that the Illinois Commission should have no power whatever to grant reparation in *any* case involving state rates after a general increase under Sec. 13 (4). There are a number of answers to such contention:

1. Although the order in Docket 11703 was entered fifteen years ago, the case at bar is the only recorded instance where the Illinois Commerce Commission sought to grant reparation on a purely intrastate rate increased by that order. Indeed we have been unable to find any recorded instance where any other state commission granted reparation under like circumstances. Certainly no such case has as yet reached *this* Court. It is therefore apparent that petitioner's apprehensions are purely fanciful and not based upon actualities.

2. To give effect to petitioner's contention would require this Court to assume that the Illinois Commerce Commission would wilfully and deliberately enter upon a course of conduct designed to thwart the enforcement of the Interstate Commerce Commission's order, and also that the courts of Illinois would lend their assistance to such scheme by entering judgment upon such awards.

3. If a state commission should deliberately embark upon such a scheme, the courts would be fully competent

to deal with the situation by injunctive relief. At any rate, the carrier would always be in a position to defend each particular suit based on a reparation award.

4. The mere possibility that the state commission might abuse its power is no argument against the existence of the power. This Court does not confer any powers upon the state authorities. This Court said in *Missouri Pacific R. Co.* v. *Boone,* 270 U. S. 466, at page 471:

> "Regulation by a state of intrastate rates is not a function exercised by permission of the Federal government (*Re Rahrer,* 140 U. S. 545, 564; 35 L. ed. 572, 577; 11 Sup. Ct. Rep. 865), or because of its inaction."

The possibility of abuse might be used as an argument against conferring the power in the first instance, but it cannot be considered by this Court in determining whether the power exists.

To summarize our argument: The Interstate Commerce Commission has power under Sections 13 (4) and 15 (a) of the Interstate Commerce Act to order a general increase in intrastate rates when such increase is necessary in order to eliminate a burden on interstate commerce as a whole. In making such an order the Interstate Commerce Commission does not determine that every specific rate involved in the state structure must be maintained at the figure to which such rate is raised as a result of a general increase. It determines merely that it is necessary that a certain general level of state rates must be maintained in order that the carriers as a whole may secure the additional revenue which the Commission has found they are entitled to under Section 15 (a). Consequently, when a state commission thereafter reduces a specific state rate there is no violation of the order of the Interstate Commerce Commission unless such reduction substantially reduces the

general level of revenue granted to the carriers by the Interstate Commission.

No distinction can be drawn in principle between a prospective reduction by state authorities of a specific state rate and a reduction by way of reparations. In both cases the state authorities are acting in the exercise of their inherent power over intrastate commerce. In both cases their action is limited to reductions which do not affect the general level of revenues decreed by the Interstate Commission. In both cases the carrier whose rate is reduced can have his day in court. In the case of a prospective reduction he may test the validity of the reduction by a bill to enjoin the state authorities from putting the rate into effect. In the case of a reparation award, the carrier may urge in the shipper's suit for a judgment on the award exactly the same grounds as a defense to that suit.

The ultimate question which this Court is called upon to decide is this: How far can the Federal power over purely intrastate traffic be extended under the claim that it is necessary to protect interstate traffic.

In the *Shreveport* case this Court stated that the Federal power over intrastate traffic extends only to "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security" and efficiency of that traffic. In *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 651, this Court has held that the power can be extended only to matters which have a "direct effect" upon interstate commerce. It is obvious that in the case at bar the award of reparation on an isolated intrastate movement did not have such a close, substantial or direct effect upon interstate traffic as a whole.

It is submitted the award of reparation in this case was within the power of the Illinois Commission, since the general level of revenue granted the carriers by Docket 11703 was not thereby substantially reduced.

II.

The order of the Illinois Commerce Commission in Docket 10620 did not deprive it of any power thereafter to award reparation upon any specific rate which it found unreasonable because that order merely prescribed an increase in the general level of intrastate rates and did not approve any specific rate.

Petitioner's argument under its Point II is so confusing to us that we consider it necessary to attempt to analyse and restate it as we understand it, in order that our reply may be clear.

Petitioner apparently contends that the Illinois Commission could not grant reparation below the level of the rates of 93½ cents and 94½ cents because, petitioner asserts, those rates were authorized by it and therefore were in effect Commission made rates. Petitioner relies upon *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370; 76 L. Ed. 348; 52 S. Ct. 183.

Petitioner then asserts that *Great Northern Ry. Co.* v. *Sunburst Oil Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145, is not inconsistent with this position because it merely holds that where the rates are Commission made reparation may be granted if at the time the rates are made notice is given that the rates are provisional. Petitioner contends that neither the statutes of Illinois nor any decisions of the Supreme Court of Illinois nor any

order of the Illinois Commission, prior to the exaction of the rates in question, gave any notice that rates authorized by the State Commission would be provisional.

Petitioner's final contention is that even if it be assumed that notice was given by the order of the Illinois Commission in Docket 10620, that notice was limited to the possibility of a reduction from the 93½ cent and 94½ cent rates to the 70 cent rate which had been increased pursuant to the order in Docket 10620.

Petitioner further contends that no notice was given as to the provisional character of the 70 cent rate, because such rate was originally prescribed by the Director General of Railroads and was continued in force after the termination of Federal Control by Section 208 (a) of the Transportation Act of 1920. These contentions may be briefly answered as follows:

Arizona Grocery Company v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370; 76 L. Ed. 348; 52 S. Ct. 183, held that "where the (Interstate) Commerce Commission has upon complaint and after hearing" declared the maximum reasonable rate to be charged upon a specific commodity, it may not thereafter grant reparation for the exaction by the carrier of such rate.

In *Eagle Cotton Oil Co.* v. *Southern Ry. Co.* (C. C. A. 5th), 51 Fed. (2nd) 443, it was held that the Interstate Commerce Commission *could* grant reparation where the rates in question had not been specifically approved by the Interstate Commerce Commission but were merely the result of the general increase granted under *Ex Parte 74*. This court denied certiorari in the *Eagle Cotton Oil* case during the same term in which it decided the *Arizona Grocery* case, 284 U. S. 675, 76 L. Ed. 571, 52 S. Ct. 130. To the same effect is *Texas and P. Ry. Co.* v. *Louisiana Oil*

Refining Corp. (C. C. A. 5th), 76 Fed. (2nd) 465, certiorari denied, 295 U. S. 767, 79 L. Ed. 1708; 55 S. Ct. 926.

The decision in the *Eagle Cotton Oil* case is predicated upon *Brimstone R. & Canal Co.* v. *United States*, 276 U. S. 104, 122, 48 S. Ct. 282, 287, 72 L. Ed. 487, where this court said:

> "The general findings and permission of *Ex parte 74* and Re Reduced Rates did not approve or fix any particular rate. * * * In them the Commission was dealing with the whole body of rates throughout the country—were looking at the general level of all rates and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration."

These decisions are quite consistent. The general principle to be deduced from them is that the Interstate Commerce Commission may not grant reparation for the exaction of a rate which it has previously specifically approved after a complaint and full hearing upon that specific rate, but inasmuch as interstate rates, until such a full hearing, are carrier made and not Commission made, reparation may be granted by the Interstate Commission where the only approval of the rate is a general advance granted under a proceeding like *Ex parte 74*.

Assuming that the Illinois Public Utilities Act is similar to the Interstate Commerce Act (as we shall demonstrate later) the doctrine of the *Eagle Cotton Oil* case and not the *Arizona Grocery* case, would apply because the Illinois Commission never at any time specifically approved the rates here under attack. The rates of 93½ cents and 94½ cents were instituted by the carriers following the decision of the Illinois Commission in its Case

Number 10620. (7 Ill. Pub. Ut. Com. Rep., 1047; Rec. 146-152). The order in that case was entered after *Ex Parte 74* and was intended to accomplish for intrastate rates exactly the same thing as was accomplished by *Ex Parte 74* for interstate rates, namely, permission to the carriers operating in Illinois to put into effect an increase in the general level of all intrastate rates in Illinois. The terms of the order were permissive, just as the terms of the order in *Ex Parte 74*. The order read in part "that all other freight rates * * * *may* be increased 33⅓ per cent". (Rec. 151).

Even if the Illinois Statute provided for Commission-made rates, no Federal or constitutional question would be involved. The question would involve only the interpretation of the Illinois statute. (*Great Northern Ry. Co.* v. *Sunburst Oil & Refining Company*, 287 U. S. 358, 362.)

Petitioner, however, attempts to inject a Federal question by contending that *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Company, supra*, requires notice to be given before the collection of rates made by a state Commission that such rates are merely provisional, and that in the absence of such notice, the granting of reparation would deny the carrier due process.

Under the Illinois Public Utilities Act the rates are in the first instance carrier made and not Commission made. The method prescribed for instituting rates in Illinois follows the Interstate Commerce Act in essential particulars and is entirely different from the public utilities acts of the various states involved in the cases cited in the footnote to page 33 of petitioner's brief.

Sections 33 to 36 of the Illinois Public Utilities Act (Ill. State Bar Stats. 1935, Ch. 111a, paragraphs 48 to 51) provide that a public utility shall file schedules with the State

Commission showing rates which it proposes to put in force. Any existing rate may be changed by the public utility by filing with the Commission a new schedule containing such change which becomes effective after 30 days notice. The State Commission, like the Interstate Commission, may either upon complaint or upon its own initiative suspend the new rate until it has investigated the same. But unless the Commission does investigate the new rate it becomes effective after 30 days. If upon such investigation the Commission finds the new rate unreasonable it may reject it and prescribe a reasonable rate.

Section 72 of this Act, under which suit was brought in the case at bar, provides as follows:

> ¶ 91. *Reparation for overcharge—Recovery in civil action—Damages—Complaints for recovery—Inquiry into claims against public utilities.*) §72. When complaint has been made to the commission concerning any rate or other charge of any public utility and the commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

Since the Illinois statute permits the rates to be instituted by the carriers in the first instance and to be modified or rejected by the Commission, after hearing, and to grant reparation if it finds such rates was either excessive or discriminatory, it thereby expressly gives notice that rates instituted by the carriers are provisional.

Petitioner's contention that other notice was necessary can have no meaning except in so far as the Illinois Com-

mission should attempt to grant reparation upon rates which it has, after full hearing, specifically found reasonable and prescribed for the future, as in the *Arizona Grocery* case. But we have already seen that the Illinois Commission never prescribed the rates in question. Therefore the rule of the *Eagle Cotton Oil* case applies and no notice other than the Illinois statute itself was necessary.

There is nothing in the decision in *Great Northern Ry. Co.* v. *Sunburst Oil Refining Co.*, 287 U. S. 358, 77 L. ed. 360, 53 S. Ct. 145, inconsistent with our contention. In that case it appeared that under the Montana statute state rates were in the first instance Commission made. (See *Montana Products Co.* v. *The Great Northern Ry. Co.*, 91 Mont. 194, 7 Pac. (2d) 919, 923.) This court held that even where the rate is Commission made, it may be provisional and subject to reparation. The only requirement imposed by the Fourteenth Amendment is that notice be given of the provisional character of such Commission made rates. Such notice may be given by the statute itself or by judicial interpretation. This Court then found that the decision of the Supreme Court of Montana in the *Doney* case, although afterwards overruled for the future, was still sufficient notice until overruled that the rates instituted by the Commission were provisional and therefore reparation might be granted, without violating the Fourteenth Amendment.

The fact that the rate in question was originally established by the Director General of Railroads did not limit the Illinois Commission in the exercise of its power to grant reparation for a period subsequent to the termination of Federal control.

It is also contended that, conceding that the Illinois Commission could award reparation to the extent by which the rates had been raised under Docket

10620, namely, from 70 cents to 93½ cents and 94½ cents per ton, it could not grant reparation below 70 cents because that rate had originally been put into effect by the Director General of Railroads under General Order Number 28 and was still in force on September 1, 1920, at the termination of the period of Federal control. Section 208 (a) of the Transportation Act of 1920 provided that all rates, fares and charges in effect on February 29, 1920, 'should continue in force and effect until thereafter changed by State authority or Federal authority, respectively, or pursuant to authority of law". It is therefore contended that the 70 cent rate was a valid rate, binding upon carriers and shippers until the state authorities, by affirmative action, changed it, and that no reparation could be granted below the level of that rate because nowhere was any notice given that such rate was provisional.

The first answer to this contention is that the 70 cent rate was not a Commission made rate. The fact that the Director General initiated such rate does not make it Commission made. The Director General was merely acting in place of the carriers. As was said in *Missouri Pacific Railroad Co.* v. *Boone*, 270 U. S. 466, 469; 70 L. Ed. 688, 691; 46 S. Ct. 341:

> "The existing right of the *carriers* to initiate rates was transferred by the second paragraph of Section 10 of the Federal Control Act to the Director General. * * *" (italics supplied).

The last paragraph of Section 10 of the Federal Control Act of March 21, 1918, Fed. Stat. Ann., Supp. 1918, p. 763, gave the Interstate Commerce Commission full authority to investigate any rates instituted by the Director General just the same as it previously had power to investigate rates instituted by carriers, and to enter any

order which the Interstate Commission might have entered before the period of federal control,—in other words, to grant reparation if any particular rate instituted by the Director General was found unreasonable. It is clear, therefore, that during the period of federal control the rates fixed by the Director General were not Commission made rates.

That these rates were carrier made is still further borne out by the provisions of the Transportation Act of 1920. Section 206 (c) and Section 208 (a) of that Act permitted the Interstate Commerce Commission either to grant reparation or reduce a rate even during the six months' guaranty period subsequent to February 29, 1920.

It is difficult to understand, therefore, how a rate which was not Commission made prior to the expiration of the guaranty period on August 31, 1920 became Commission made after that date when control of the rate was returned to the state authorities. Petitioner suggests that it became Commission made after that period because Section 208 (a) of the Transportation Act of 1920 provided that the rate should continue in force until thereafter changed by state authority. The real purpose and meaning of this provision is set forth in *Missouri Pacific R. R. Co.* v. *Boone, supra,* wherein this court held that that provision contained no prohibitions but merely explained which tariff should be deemed operative. It did not intend to conserve any revenues for the carriers and "there was no purpose in Congress to maintain in force, after the expiration of the six months' guaranty period, either the interstate or the intrastate rates which had been established by the Director General." (U. S. p. 474, L. ed., p. 693.)

In so far as petitioner contends that no reparation could be granted because the carriers had no notice that the 70-cent rate was provisional, the answers are:

First, the Federal Control Act of March 21, 1918 by permitting the Interstate Commerce Commission to investigate rates initiated by the Director General and to grant reparation gave sufficient notice that such rates were provisional;

Secondly, the Transportation Act of 1920, by giving the Interstate Commerce Commission power to grant reparation upon any rates initiated by the Director General which it found unreasonable even during the six months' guaranty period, gave notice that such rates were provisional; and

Thirdly, the interpretation placed by this Court on Section 208 (a) means that that Section also gave notice that the rates were provisional and that the state authorities would have the right to deal with them as provisional when the control of intrastate traffic was returned to them.

III.

The judgment of the court below did not deprive petitioner of due process of law.

Petitioner under Point III of its brief contends that it has been deprived of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States because, (1) the Appellate Court of Illinois refused to review the evidence in the case, and (2) regardless of whether that court reviewed the evidence, there was a total absence of competent evidence to sustain the award of reparation.

A. *The Appellate Court of Illinois In Fact Reviewed the Evidence. Therefore Its Construction of Section 68 of the Illinois Public Utilities Act being unnecessary to its decision will not be reviewed by this Court.*

The answer to the first branch of petitioner's contention is that the Appellate Court, notwithstanding the opinion expressed by it that, under a proper construction of Section 68 of the Illinois Public Utilities Act, petitioner, by failing to appeal, had lost its right to contest on the merits the order of the Illinois Commission granting reparations, in fact *did review* the evidence. The opinion of the Appellate Court conclusively establishes this, for the court in that opinion said (Rec. 231):

> "Nevertheless, we have examined the evidence and think it sufficient to sustain the findings, and we have examined the findings and hold the same sufficient to justify the order for reparation."

Not only did the Appellate Court review the evidence, but the detailed and careful analysis of facts and evidence found in the court's opinion (Rec. 222-227) indicates a most careful and conscientious consideration of the case on its merits. So well did the Appellate Court consider the facts, that Petitioner has used the opinion of that court as its own statement of the facts in its brief. Clearly petitioner was not deprived of due process by any failure on the part of the Illinois court to review the evidence.

This court has held many times that it will not review a Federal question unless the decision of the state court upon that question was necessary to the determination of the cause and that the judgment as rendered could not have been given without deciding it. See *Brown* v. *Atwell*, 92 U. S. 327, 23 L. Ed. 511; *First National Bank* v. *Esther-*

ville, 215 U. S. 341, 54 L. Ed. 223, 30 S. Ct. 152. Inasmuch as the Appellate Court reviewed the evidence it was not necessary for it to consider the construction of Section 68 of the Public Utilities Act and therefore this court will not review any federal question based upon that construction.

B. *The Petitioner was not Denied Due Process of Law by Lack of Evidence to Sustain the Award of Reparation.*

The second branch of petitioner's contention that it has been deprived of its rights under the Fourteenth Amendment to the Federal Constitution is based upon the alleged insufficiency of the evidence before the Illinois Commission to sustain the reparation award.

(1) Petitioner's failure to raise this question in the Trial Court prevents it from raising it here.

Petitioner cannot urge in this Court that it has been deprived of property without due process under the Federal Constitution because of a lack of evidence to support the award of reparation, for the reason that petitioner failed to set up or claim this defense, in the trial court.

Petitioner filed four pleas in the state court (Rec. 11-13); first, non-assumpsit; second, not guilty, third, *nil debit;* and fourth, a notice of special defenses.

In none of these pleas is any mention made of an absence of evidence to support the award of the Illinois Commission. No claim is made of any deprivation of property without due process or any violation of the Fourteenth Amendment to the Federal Constitution. The contention now urged by petitioner is not to be found in any pleading in this case.

The rule of law as to the necessity of properly raising a constitutional question in the state court in order that

such question may be reviewed by this Court is well settled. In *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 20 S. Ct. 205, 44 L. Ed. 299, the Supreme Court of Illinois had rendered a judgment sustaining a tax on tangible property and also a capital stock tax levied upon the plaintiff in error which maintained an inter-state bridge across the Mississippi River. Plaintiff in error had filed objections to the tax on tangible property both on the ground that it constituted a violation of its rights under the Fourteenth Amendment to the Federal Constitution and that it was an interference with interstate commerce. As to the capital stock tax, the objections of plaintiff in error covered only the ground of interference with interstate commerce, and no objection was made based on a violation of its rights under the Fourteenth Amendment. This Court held that no objection to the capital stock tax on the ground of its violation of the Fourteenth Amendment could be urged in this Court because that objection had not been raised in the state court, saying (U. S. p. 633; L. Ed. p. 302):

> "4. As to the objection that the entire capital stock was assessed by the state board of equalization, it is enough to say that the question that the action of that board was in violation of the Constitution of the United States, except so far as it was claimed to be an interference with interstate commerce, was not raised.
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> • • •
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> "In *Dewey* v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379, it was held that where a Federal question is raised in the state courts, the party who resorts to this court cannot raise another Federal question, not connected with it, which was not raised in any of the courts below.

"To justify our taking jurisdiction, the Federal question must be specially set up or claimed in the state court; the party must have the intent to invoke for the protection of his rights the Constitution or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709. * * *"

In *Erie Railroad* v. *Purdy*, 185 U. S. 148, 22 S. Ct. 605, 46 L. Ed. 847, in an action brought in the Supreme Court of New York against a carrier to recover penalties under the Mileage Book Act, the answers filed by the defendant in the trial court set forth that the statute relied upon in the declaration was unconstitutional and void because it constituted a violation of the commerce clause of the Federal Constitution and "also because it is in violation of various other provisions of the Constitution of the United States and of the Constitution of the State of New York." At the close of the evidence the defendant renewed its motion to dismiss the complaint, but the sole ground on which it assailed the validity of the statute was that it constituted an interference with the regulation of interstate commerce.

This court held that the defendant had sufficiently raised in the trial court the question of the alleged violation of the commerce clause of the Federal Constitution, but had not sufficiently raised the question of the violation of the Fourteenth Amendment, notwithstanding that a general reference had been made by the defendant in its answer to an alleged violation of "various other provisions of the Constitution of the United States", saying (U. S. p. 153; L. Ed. p. 850):

"In the present case the statute was not drawn in question in the trial court as invalid under any clause

of the Constitution except the one relating to commerce. It was not even asserted there to be invalid under 'various other provisions' of that instrument. The statements in the motion for nonsuit, that 'the cause of action alleged in such action has not been proved', and that 'no cause of action has been proved in either of the actions consolidated in the action on trial,' were too vague and general to indicate that the defendant claimed anything under that Amendment. The record before us is consistent with the idea that the defendant did not claim, in the trial court, in any form, generally or specially, that the statute deprived it of its property without due process of law, or denied to it the equal protection of the laws. * * *"

In its present brief petitioner fails to discuss this question, but in its petition for certiorari, it rested its contention that this federal question was sufficiently raised in the state court solely upon its motion to find the issues for the defendant (petitioner) at the close of all the evidence and its motion in arrest of judgment. An examination of these motions (Rec. 189-191) will show that both motions were merely formal ones. Not only did they fail to make mention of the Fourteenth Amendment or of any deprivation of property without due process, but they specified no grounds of any character.

In *Erie Railroad* v. *Purdy*, 185 U. S. 148, 22 S. Ct. 605, 46 L. Ed. 847, *supra*, this Court expressly held that a motion for a nonsuit does not indicate that the petitioner claims anything under the Fourteenth Amendment unless that motion specifically states as a ground therefor that petitioner has been deprived of property without due process.

Petitioner in its petition for certiorari relied upon *Consolidated Coal Co.* v. *Illinois,* 185 U. S. 203, 46 L. Ed. 872, 22 S. Ct. 616. That case is of no assistance to the petitioner but rather it supports the contention of respondent, for it is stated in that case that there was a motion made in arrest of judgment "in which the invalidity of the statute was specially set up upon the ground of its repugnancy to the 14th Amendment to the Constitution" (U. S. p. 206; L. Ed. p. 875).

(2) There was no lack of substantive evidence before the Illinois Commission to support its award of reparation.

Petitioner contends that there was no substantive evidence before the Commission to support its award of reparation and that therefore petitioner was deprived of property without due process, citing *Northern Pacific Ry. Co.* v. *North Dakota, ex rel McCue,* 236 U. S. 585; 59 L. Ed. 735; 35 S. Ct. 429. Petitioner concedes that this Court will not weigh the evidence before the Commission but will examine the record to determine only whether there is any substantive evidence to support the Commission's findings. This doctrine has been many times confirmed by this court. See the latest expression in *Atlanta, Birmingham & Coast R. R. Co.* v. *United States,* ..... U. S. .....; 80 L. Ed. (Adv.) 25; 56 S. Ct. 12.

The evidence taken by the Commission covered 130 typewritten pages and included 17 exhibits, some of which were very voluminous, and showed the following facts:

1. For a long period of time, namely, from August, 1911 to June 24, 1918, the rates on common brick from Bernice, Illinois, to points within the Chicago Switching District were the same as the rates on common brick between points

wholly within the Chicago Switching District, 25 cents per ton (Rec. 41; Ex. 5; Rec. 69). The fact that this rate was voluntarily maintained by the carriers for such a long time would be persuasive, if not conclusive, evidence that a sudden increase to 98 cents, or almost 300 per cent, while the rate within the District was contemporaneously increased to only 40 cents, would make the 98 cent rate unreasonable.

2. During this long period of time the one line carload rate on general commodities and the two-line rate on common brick between points wholly within the Chicago Switching District was 30 cents per ton, only 5 cents per ton *more* than the one-line brick rate from Bernice and within the District (R. 44).

3. Because of the errors of the Director General first, in applying a 40 cents per hundred pound flat increase on common brick at the same time a 25 per cent increase was applied to general commodities within the Switching District, and secondly, in withdrawing such 40 cents per ton increase on movements of brick within the Switching District, but leaving it in effect as to Bernice, the one-line rate on common brick from Bernice became 70 cents as against a one-line rate on brick of 30 cents within the District.

4. At the same time that the rate on common brick from Bernice to the Switching District was 70 cents per ton, the rate on general commodities within the District itself was only 40 cents per ton (Rec. 44).

5. The result of the action of the Director General also created another anomalous and wholly unreasonable situation, to wit: the rate on common brick via a two-line haul within the Chicago Switching District became about one-half the contemporaneous one-line brick rate from Bernice, to wit: 40 and 60 cents as compared to 70, 93½, 94½ and 98 cents (Rec. 41). Since the two movements

were in all ways comparable, the one-line rate should of course have been appreciably lower than the two-line rate.

6. The evidence before the Commission also showed the economic and competitive conditions relating to the brick industry within and nearby the Chicago Switching District. This showed that the principal market for common brick from Bernice was the Chicago District and that it would be impossible to operate the plants at Bernice without shipping to the Chicago District, because only 25 per cent of the plants' capacity went to markets outside the District (Rec. 40).

It also showed the numerous plants located within the Chicago Switching District with which the plaintiff's plants at Bernice were in competition (Rec. 40; Rec. 68).

The record also shows that at the time the rates of 93½, 94½ and 98 cents per ton on common brick were in effect from Bernice, there were in effect from Chicago Heights into the Chicago Switching District rates of 42 cents and 50 cents per ton on hollow tile. Chicago Heights is eight or nine miles farther away from the Switching District than Bernice and hollow tile is a strong competitor of common brick (Rec. 45-46).

7. The evidence as to the distances from Bernice to points of destination within the District, as compared to distances between points of origin and destination wholly within the Chicago Switching District, shows that there is no material difference (Exs. 2, 6, 7 and 8; Rec. 67, 70, 71, 72).

8. The cross-examination of the defendant's own witnesses shows that the operating conditions with respect to movements from Bernice were no more difficult than

those respecting movements wholly within the District; in fact, there are movements within the District itself that are more complicated than the movement from Bernice (Rec. 54-6).

9. The rate of 50 cents per ton from Bernice to points of destination within the Chicago Switching District was *voluntarily* put into effect by the carriers, including petitioner, as of February 16, 1922. This fact alone was substantive evidence from which the Illinois Commission might find a 50-cent rate reasonable.

10. Although the decision of the Interstate Commerce Commission in Docket 11317 permitted the carriers to charge 10 cents per ton more on interstate brick shipments from Bernice than on shipments wholly within the District, the carriers, including petitioner, not only reduced the 98 cent rate, but voluntarily restored the parity that had existed prior to June 25, 1918, between rates from Bernice and rates on brick within the District. Furthermore this voluntary reduction resulted in again placing the rate on brick from Bernice below the level of rates on general commodities within the District. These facts constituted substantive evidence that the rates of 93½ cents, 94½ cents and 98 cents, which were considerably higher than the contemporaneous rate on common brick and general commodities within the District, were unreasonable.

In *Virginian R. Co.* v. *United States*, 272 U. S. 658, 666, 71 L. ed. 463, 468, 47 S. Ct. 222, this Court held that evidence that other railroads were voluntarily transporting similar traffic in the same territory under like operating conditions upon lower rates afforded "substantive evidence to support the finding that the existing rates were unreasonable and that those which the order directs are reasonable."

In the case at bar the evidence shows not only that other railroads, but petitioner as well, were voluntarily transporting not only similar commodities but much higher grade commodities in the same territory under like operating conditions at much lower rates. Such evidence under the ruling in the *Virginian Railroad* case would be sufficient in and of itself to sustain the findings of the Illinois Commission and to show that there was no violation of the due process clause.

See also to the same effect *Chicago, M. & St. P. Ry. Co.* v. *Public Utilities Commission of the State of Idaho*, 274 U. S. 344, 350, 71 L. ed. 1085, 1090, 47 S. Ct. 604, wherein this court held that evidence that certain rates were very low "in comparison with rates on other commodities" was sufficient to warrant, if not to require, a finding that they were confiscatory.

In the case at bar the evidence showed the converse, namely, that the rates assailed were very *high* compared to other commodities. Therefore, it follows that this evidence was sufficient to warrant, if not to require, a finding that the rates were unreasonably high.

The only real contention made by petitioner is that since the Illinois Commission referred to the cost study in finding the 50-cent rate reasonable (Rec. 36), then this court can examine only the cost study in order to determine whether or not there was any substantive evidence to support the Commission's findings.

It has been many times held by the Interstate Commerce Commission that cost studies are mere approximations. *American Fruit Growers, Inc., of California, et al.* v. *Southern Pacific R. R. Co.*, 144 I. C. C. 639, 659. Furthermore, in determining the reasonableness of a single rate on one *particular* commodity, a cost study has even less accurate

value. Thus, in *Sugar from Key West,* 112 I. C. C. 347, the Interstate Commerce Commission says (page 348):

> "It is extremely difficult, if not impossible, to ascertain accurately the cost of transporting a particular kind of traffic for a certain distance."

In view of the fact that a cost study is only a rough approximation, the Commission of course not only had the right, but was required, to analyze the various details presented by the cost study, to consider the possibilities of error in such details and the unreliability of the testimony of petitioner's witness, and to draw its own conclusion as to what rate was reasonable. The Illinois Commission was not required to accept at face value the conclusions of petitioner's witness as to the cost of operations.

As an illustration of the unreliability of the testimony adduced by petitioner's witness LaRue, we quote the following cross-examination of that witness appearing on pages 402 and 403 of the record filed in the Appellate Court of Illinois:*

> "Q. You remember testifying in the case before the Interstate Commerce Commission Docket 11317?
>
> "A. I do.
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> * * *
>
> "Q. Do you remember being asked by Commissioner Mackler this question and making this answer: Then the actual line haul cost as distinguished from the two terminal service would be a very small figure compared with the two terminal service? and

*This has been omitted from the printed transcript of the record prepared by the Clerk of this Court. Respondent had no opportunity to supply in the printed transcript of the record the parts so omitted.

did you answer: Apparently so, yes. And were you asked, Well would it be five per cent? and you said, Possibly.

"Q. Do you remember these questions being asked you?

"A. I don't remember. I couldn't say without refreshing my mind.

"Q. Have you no recollections on this matter?

"A. Not on those particular questions.

"Q. You don't recall answering Examiner Mackler that the road haul cost would be possibly five per cent of the terminal cost?

"A. I don't know, no, sir.

"Q. If you had made such an answer, do you think it would have been correct at that time?

"A. *That was my opinion at that time.*" (Italics supplied.)

Petitioner in effect is asking this Court to overlook the fact that the Commission made findings as to all the other facts which we have enumerated above and that it does not appear from the order of the Commission that its finding that the assailed rates were unreasonable was based only on the cost study. The Commission had the right to consider the cost study in the light of all these other facts, and this it obviously did.

The only question before this court is whether or not there was *any* substantive evidence before the Commission to support its findings and award. It is clear that entirely apart from the cost study there was sufficient sub-

stantive evidence to support the award and therefore petitioner was not deprived of property without due process of law.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

ABRAHAM R. MILLER,
For Respondent.